

# Public Interest Factors in African Competition Policy

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The consideration of public interest factors in competition law inquiries has generated much debate over the past few years. Several high profile cases have illustrated the potential for competition decisions, and in particular merger inquiries, to be significantly affected by non-competition public interest issues.

In this chapter we first describe the key provisions under which African authorities consider public interest factors, and highlight some of the most notable applications from cases. Next, we discuss how public interest factors can influence the wider implementation of competition policy, in particular through prioritisation. Finally, we consider the assessment of public interest factors, and set out some of the key debates that will continue as these concepts are applied.

While many African jurisdictions include provisions for public interest factors, there are a variety of different formulations, and the scope given to the ‘public interest’ varies substantially. Much of the current application has been in South Africa. However, as these provisions are interpreted throughout the continent there is potential for an even broader understanding to emerge. There is a danger that these broad interpretations may distract from a substantive consumer welfare or competition test, causing harm to the very public interest that competition policy was intended to serve.

Throughout this chapter, while we make reference to legislative provisions citing the public interest, we consider ‘public interest factors’ as distinct from those that would substantially be included within a standard competition test. While a standard competition test might be concerned with allocative, productive or dynamic efficiency, in particular the enhancement of consumer welfare through a process of rivalry (lowering prices, expanding output, improving quality and enhancing innovation), such a standard test would typically not have primary regard to factors such as: the promotion of employment, the promotion of exports, the promotion of national champions, the competitiveness of national firms in international markets, or the spread of ownership or wealth.

## Provisions

Public interest factors are certainly not unique to African jurisdictions. The UK competition authorities had a ‘public interest’ test from 1948 to 1998, a ‘malleable’ concept, including protection of employment and exports, which allowed ‘fairly unconstrained political discretion.’<sup>2</sup> Even the current UK merger regime allows for government intervention under specified public interest criteria, the most prominent recent example being the approval of the *Lloyds TSB/HBOS* merger on public interest grounds.<sup>3</sup> In the assessment of the national Energieakkoord, the Netherlands authority illustrated its position that a competition assessment might need to be balanced against public interest considerations such as environmental protection.<sup>4</sup> The European Court of Justice has made it clear that other public interest objectives might affect the consideration of a pure competition test,<sup>5</sup> and even the US has conferred antitrust immunity on small businesses in some instances.<sup>6</sup>

Although public interest tests are prevalent throughout Africa, they are not universal. Oxenham (2012) notes that South Africa, Botswana, Malawi, Namibia, Swaziland and Zambia include some form of public interest consideration as part of their competition regulation.<sup>7</sup> Mauritius, however, has no public interest test, and Mariotti and Brouwer (2013) note that there are additionally enforceable merger regimes in Algeria, Cameroon, Egypt, Gabon, Ivory Coast, Kenya, Morocco, Nigeria, Tanzania, Tunisia and Zimbabwe.<sup>8</sup>

South Africa is the largest economy in Africa, and has the most developed and extensively applied competition policy. Under South African competition law, public interest factors can be used to sanitise an anti-competitive merger, or to prohibit a pro-competitive one.<sup>9</sup> The public interest test involves an assessment of the impact of the merger on a particular industrial sector or region; employment; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; and the ability of national industries to compete internationally.<sup>10</sup>

In Namibia, public interest factors form part of an unlimited list of potential considerations in merger investigations.<sup>11</sup> Public interest factors including maintaining or promoting exports, ‘promoting stability’ (albeit only in industries designated by the relevant minister), and even ‘obtaining a benefit for the public’, can also be used to justify an exemption for otherwise anti-competitive agreements.<sup>12</sup>

In Botswana, public interest factors can be used to exempt certain mergers from review<sup>13</sup> and also form a set of additional considerations in merger investigations, although the scope of public interest factors is not limited.<sup>14</sup>

In Zambia, public interest factors can be used to initiate an investigation into mergers that fall below the prescribed notification thresholds<sup>15</sup> and also form a set of additional considerations in a merger review. The scope of potential factors for consideration is essentially unlimited, including not only employment, exports, and international competitiveness, but also ‘socioeconomic factors as may be appropriate; and any other factor that bears upon the public interest.’<sup>16</sup>

In Kenya, public interest factors form part of an unlimited list of potential considerations in merger investigations.<sup>17</sup> Factors including maintaining or promoting exports, ‘promoting stability’, or even ‘obtaining a benefit for the public’, can also be used to justify an exemption for otherwise anti-competitive agreements.<sup>18</sup>

In Swaziland, public interest factors form part of an unlimited list of potential considerations in merger investigations.<sup>19</sup> Listed factors include international competitiveness, the competitiveness of a sector or region, and the ability of small enterprises to become competitive.

In Malawi, public interest factors including exports and employment are included within an overall assessment of the net effect of a merger.<sup>20</sup> A similar balanced assessment is allowed in regard to inquiries into potential abuses of dominance or anti-competitive agreements, except for certain hard-core price fixing and unilateral conduct.<sup>21</sup>

Nigeria has not yet passed any specific competition law, although the relevant provisions of the investment and securities legislation include powers to determine whether any business combination is likely to substantially prevent or lessen competition. Under this regime, an anti-competitive merger may be justified by reference to public interest factors such as the impact on a sector or region, employment, the ability of small businesses to become competitive and international competitiveness.<sup>22</sup>

In the Gambia, public interest factors only have a limited role as a list of potentially offsetting factors in the event that an anti-competitive agreement, abuse, or merger has been found. The only factor that would not fall within a standard competition assessment is 'enhancing the effectiveness of the Government's programme for the development of the economy of the Gambia.'<sup>23</sup>

There is no public interest test alongside the competition test for mergers and no public interest test for deciding on cartel or abuse of dominance matters in Mauritius.<sup>24</sup>

While the East African Community allows the Council to approve a merger on appeal if it believes it is to 'fulfil an overriding public interest', no public interest factors are described.<sup>25</sup>

Under the COMESA Competition Regulations, 'public interest grounds' can be used to justify an otherwise anti-competitive merger, although the listed factors seem unnecessary, as they generally overlap with a standard competition assessment (including maintaining competition, having regard to price, quality, range and service, and promoting efficiency, innovation and new entry).<sup>26</sup>

### Application

In *Kansai/Freeworld* (2012) the South African Competition Tribunal approved remedies dealing with a range of public interest concerns, including the impact on employment, deindustrialisation, and a reduction in research and development, which involved Kansai committing not to retrench any Freeworld employees for three years, and investing in a new OEM facility in South Africa within five years.<sup>27</sup>

*Wal-Mart/Massmart* (2011) is perhaps the most widely discussed application of public interest factors in African antitrust.<sup>28</sup> Although the Tribunal had found that the merger raised no competition concerns, it approved remedies dealing with employment and local procurement concerns: no merger-specific retrenchments for two years; new employment opportunities must give preference to retrenchments made just prior to the merger hearing; and the merged entity must honour existing labour agreements and recognise the largest representative union and must fund the development of local South African suppliers.<sup>29</sup> These conditions were strengthened on an appeal to the Competition Appeal Court, in particular to reverse the recent retrenchments, and to increase the funding for the development of local suppliers.<sup>30</sup>

The Tribunal approved the *Metropolitan Holdings/Momentum Group* (2010) merger subject to a limited moratorium on retrenchments for two years, in a decision that significantly clarified the Tribunal's approach to public interest considerations.<sup>31</sup>

The *Iscor Limited/Saldanha Steel* (2002) merger was approved on failing-firm grounds, and also passed the public interest test on the basis of severe economic consequences for the Saldanha Bay region if the merger did not proceed.<sup>32</sup>

Namibia has also addressed employment issues. In *DCD-Dorbyl/Elgin Brown & Hamer Group* (2012) the Namibian Competition Commission required that there would be no retrenchments for two years.<sup>33</sup> In *Wal-Mart/Massmart* (2011), although Wal-Mart had no presence in Namibia and Massmart had only a few stores, the

Commission initially imposed conditions of no employment losses and that Wal-Mart must make allowance for local participation in the merged entity. Following an appeal to the Supreme Court of Appeals, a review application to the minister of trade and industry resulted in revised conditions of no retrenchments for two years, recognition of existing labour agreements and representative trade unions, and the development of domestic supplier activities.<sup>34</sup>

Two decisions highlight the public interest factor of spreading ownership in Botswana. In *AON/AON Botswana* the Authority was concerned that the transaction, which involved the sale of a 25 per cent interest that was previously in the hands of Botswana citizens through the Citizen Entrepreneurial Development Agency (CEDA), would disempower citizens and that the disposal should rather have been made to other citizen buyers.<sup>35</sup> Similarly, *MRI Botswana/BOMAID* (2012) concerned the sale of shares in MRI Botswana held by CEDA Venture Capital Fund Limited, which should be sold to other citizens who are not already part of MRI Botswana.<sup>36</sup>

### Policy

The brief summary above indicates that public interest factors typically concern merger control, although these factors can occasionally be taken into account in regard to inquiries into abuses of dominance and agreements. However, more fundamentally, public interest factors have significant scope to affect wider enforcement activity, in particular through prioritisation policies.

By way of example, the Namibian Competition Act states that the Commission should consult with the minister on 'any matter which is of great economic or public interest'. In Nigeria, the draft Federal Competition Bill, which is currently before the National Assembly provides for the Commission to '[i]nitiate policy review periodically on competition and related issues with a view to safeguarding and protecting public interest.'<sup>37</sup>

In South Africa, while the restrictive practices and abuse of dominance provisions do not provide for a specific consideration of public interest factors, public interest considerations have had a significant impact on these instruments through the Competition Commission's approach to case prioritisation. In 2007, the Commission decided to adopt a prioritisation framework in terms of which it would proactively direct resources towards particular cases and complaints based on three main criteria: the potential impact of the conduct on low-income consumers; alignment with the government's broader economic policy objectives; and the likelihood of the conduct being anti-competitive.<sup>39</sup> Four sectors were identified: food and agro-processing; construction and infrastructure products; intermediate industrial products; and banking. In addition, the Commission determined to focus its enforcement efforts towards prosecuting cartel activity in the identified priority sectors. In this way, the Commission has implicitly introduced public interest considerations into its non-merger enforcement activities. A review of the prioritisation policies of competition authorities by UNCTAD shows that the South African authority is not unique in this respect.<sup>40</sup>

### Assessment

The public interest provisions described above typically involve unified decision making by a single competition authority. This allows a consistent approach across cases and a coherence within each case, either by performing an explicit balancing, or at least undertaking the assessment of public interest factors through the lens of the competition analysis. This also may reduce the scope for lobbying of the government departments which might otherwise have been entrusted with the public interest assessment.

However, leaving aside the different legislative constructions, there may be some tension in considering public interest factors alongside a competition assessment in a single evaluation, such as a merger decision, in that there may be no clear way to balance the public interest assessment and the competition assessment.<sup>42</sup>

Moreover, the standard competition test is aimed at a broad 'public interest' via the focus on consumer welfare. An efficient and effective competition regime is intended, through both the direct effects of actions it brings – and deterrence – to promote a healthy competitive environment, and to encourage pro-competitive investments, lower prices, higher output, and better range, quality and service. Such outcomes should ultimately drive economic growth and employment opportunities. Prohibitions on abuses of dominance should enhance access to markets, and promote entry and competition by smaller firms. Accordingly, the standard competition test encompasses several of the public interest factors that are commonly identified in legislation.

Even considering a specific public interest factor alone, such as employment, it may seem self-defeating to not consider the net effect of a merger, as opposed to focusing on any negative effect, and any positive effect on the same factor, separately. To do otherwise might risk discouraging employment-enhancing mergers in which a small component might have led to an employment reduction. However, as the decisional practice shows, as a matter of public policy, perhaps particularly in a developing-country context, market frictions may leave particular groups vulnerable to the change wrought by a merger, even if the net effect is positive.

In regard to the evidence, many of the public interest benefits of a standard competition test may only arise in the longer term, are unlikely to be the primary areas of focus on the merging parties, and may therefore be more difficult to measure. By contrast, immediate public interest impacts, such as anticipated redundancies, are likely to be estimated and documented as part of the business plans, forecasts and models commonly prepared in anticipation of an acquisition. Accordingly, this 'hard evidence' is often accorded greater weight than the more diffuse and hard to measure public interest benefits of standard competition.

Perhaps inevitably, public interest factors can be seen as ripe for remedies. This has the potential to lead to significant inefficiencies, not only in preventing mergers that are pro-competitive (but employment reducing in the short run), but also in raising the costs even of employment enhancing mergers, and thereby reducing the scope for employment creation and growth.

Despite this temptation, the emerging case law appears to recognise that, as with a standard competition test, remedies should only be required to address a merger specific issue, and not to address wider policy objectives.<sup>43</sup> Strengthening pre-existing contractual protections, or imposing asymmetric burdens on one competitor in a market in which others are not so constrained would not only be unfair, but may risk other unintended distortions. Furthermore, competition policy may not be the most appropriate tool for some of the issues that might be considered under a broad conceptualisation of the public interest.<sup>44</sup> From a policy perspective it is important to consider the potential impact of implementing a test that attempts to reconcile a wide range of factors. Such a test is likely to increase the complexity, uncertainty and cost of merger reviews, and may significantly deter investment.

The approach which appears to be emerging is that there is a role for public interest factors, perhaps particularly in developing economies, although there need to be sufficient safeguards against the abuse of these provisions. Such factors are likely to be drawn

on only exceptionally, and should be seen within the context of the primary competitive assessment. Only then will competition policy ultimately serve the public interest, as these important provisions are considered and applied throughout Africa.

#### Notes

- 1 We are grateful to Chris Whelan and Rodney Armstrong for research assistance.
- 2 Scott, A, 2009, 'The Evolution of Competition Law and Policy in the United Kingdom', *LSE Law, Society and Economy Working Papers* 9/2009. See also Wilks, 1999, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission*, Manchester University Press.
- 3 The secretary of state (now the culture secretary) can issue an 'intervention notice' under which they take a merger control decision rather than the Office of Fair Trading or Competition Commission (now the Competition and Markets Authority) under the stipulated public interest criteria, of national security, media plurality and financial services, as set out in section 42 of the Enterprise Act 2002. The specific basis for the *Lloyds TSB/HBOS* merger was described in: Department of Business, Innovation and Skills, 'The Creation of a new Public Interest Consideration on Stability of the UK Financial System' (7 October 2008). See OFT Report, 'Anticipated Acquisition by Lloyds TSB plc of HBOS plc: Report to the Secretary of State for Business Enterprise and Regulatory Reform' (24 October 2008). The public interest rationale was stated as to 'ensure the stability of the UK financial system'. See Stephan, 2011, 'Did Lloyds/HBOS Mark the Failure of an Enduring Economics Based System of Merger Regulation?', *Northern Ireland Legal Quarterly*, July 2011
- 4 ACM, 'Strategy Document', 20 September 2013. See also <http://pid.acle.nl>. See [www.acm.nl/en/publications/publication/12046/ACM-deal-over-closing-down-coal-power-plants-harms-consumers/](http://www.acm.nl/en/publications/publication/12046/ACM-deal-over-closing-down-coal-power-plants-harms-consumers/). 'We have established that the energy companies' deal will result in drawbacks for consumers. The deal leads to higher energy bills for consumers because production capacity is reduced. We have additionally found that the environmental benefits that these parties are offering are too small to offset these drawbacks.'
- 5 See, for example, *Wouter, J C J Wouters, J W Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, Judgment 19 February 2002, Case C-309/99.
- 6 Posner, R.A., 2001, *Antitrust Law*, University of Chicago Press. There seem to be no public interest provisions in the Sherman Act or the Clayton Act, although the Small Business Act (15 U.S.C. sections 631–657f), section 640(b), 'confers antitrust immunity on joint actions undertaken by small business firms in response to a request by the President pursuant to a voluntary agreement or program approved by the President to further the objectives of the Small Business Act, if found by the President to be in the public interest as contributing to the national defense.'
- 7 Oxenham, J, 2012, 'Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty', *US-China Law Review* Vol. 9:211.
- 8 Mariotti, D, and Brouwer, O, 2013, 'Navigating the course of African competition law: A case for increased and improved regional cooperation and convergence', 2013, citing <http://services.bowman.co.za/Brochures/PracticeAreas/CompetitionAfrica/1709%20BG%20Competition%20Africa%20LRVS.pdf>.

Mariotti and Brouwer also note that the following countries have a merger control regime in place, but it is not enforced or there is limited information about its enforcement: Burundi, Cape Verde, Ethiopia, Gambia, Madagascar, Mozambique and Seychelles. Burkina Faso, Chad,

- Djibouti, Mali, Mauritania, Senegal and Togo have no merger control regime but do otherwise regulate competition. Benin, Central African Republic, Equatorial Guinea, Eritrea, Guinea, Guinea Bissau, Liberia, Libya, Niger, Sierra Leone, São Tomé and Príncipe, Somalia and South Sudan have no competition or merger control legislation.
- 9 The Competition Act only refers to public interest in the context of mergers, and the Competition Amendment Act (Act No. 1 of 2009) does not mention public interest factors, so there is no public interest test for market inquiries, which is the only part of the Amendment Act to have been put into force to date.
  - 10 Competition Act, section 12A(1)(b) and 12A(3).
  - 11 Competition Act, 2003, section 47(2). 'The Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including...'
  - 12 Competition Act, 2010, section 28(3). While 'the public interest' is also cited as a potential basis for interim relief in the context of investigations into anti-competitive agreements or abuses of dominance, no specific factors are mentioned (section 39).
  - 13 Botswana Competition Act (2009), section 53.
  - 14 Botswana Competition Act (2009), section 59 (2): 'The Authority may in addition, consider any factor which, the Authority considers bears upon the broader public interest in the proposed merger, including...' While 'the public interest' is also cited as a potential basis for interim relief in the context of investigations into potential abuses of dominance or anti-competitive agreements, no specific factors are mentioned (section 46).
  - 15 Competition and Consumer Protection Act (No. 24 of 2010), (part IV, section 27(1)(e))
  - 16 Competition and Consumer Protection Act (No. 24 of 2010), (part IV, section 31). The way that these factors are described indicates that they would could be used to justify an otherwise anti-competitive merger. While 'the public interest' is also cited as a potential basis for interim measures in merger, agreement and abuse investigations, no specific factors are mentioned (section 62 (B)).
  - 17 Competition Act, 2010, section 46(2). 'The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including...'
  - 18 Competition Act, 2010, section 26(3). There are other exemptions for intellectual property rights (section 28) and professional rules (section 29). While 'the public interest' is also cited as a potential basis for interim relief in the context of investigations into restrictive agreements and restrictive trade practices involving trade associations, no specific factors are mentioned (section 37). While 'the public interest' is cited as the test to be applied in regard to an investigation into unwarranted concentrations of economic power, the effects listed under this test all fall within a standard competition framework, such as high prices or profits, or low quality or output.
  - 19 Section 17(2)(h) of the Competition Act, 2007. 'When determining whether or not a proposed merger is anti-competitive, the Commission shall consider any factor relevant to competition, including but not limited to the following...'
  - 20 Malawi Competition and Fair Trading Act, section 38(1), and (2) 'The commission shall not authorize a merger or takeover unless on balance the advantages of Malawi outweigh the disadvantages.'
  - 21 Malawi Competition and Fair Trading Act, section 44. Outright prohibitions are captured under sections 33(3), 41(1) and 43(1).
  - 22 Investment and Securities Act (2007), and the Rules and Regulations of the Securities and Exchange Commission. Investment and Securities Act (2007), section 121(1)(c), and 121(3).
  - 23 Competition Act, 2007, section 35(3), and specifically section 35(4)(d). While 'the public interest' is cited as a potential basis for interim relief in the context of investigations into agreements, abuses of dominance, or mergers, no specific factors are mentioned (section 52(3)(b)).
  - 24 While 'the public interest' is cited as a potential basis for interim relief in the context of investigations into agreements, abuses of dominance, or mergers, no specific factors are mentioned (section 62(1)(b)(B) of the Competition Act 2007).
  - 25 East African Community Competition Act, 2006.
  - 26 COMESA Competition Regulations of 2004, article 26, paragraph 1, and paragraph 4. This is further supported by the draft guidelines on the application of the public interest criteria, paragraph 2.2.
  - 27 Competition Tribunal of South Africa, *Kansai Paint Co Ltd and Freeworld Coatings Ltd* 53/AM/Jul11, 20 January 2012.
  - 28 Competition Tribunal of South Africa, *Wal-Mart Stores Inc and Massmart Holdings Limited*, 73/LM/Dec10, 29 June 2011.
  - 29 [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/Walmartpressrelease-31.05.2011.doc](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/Walmartpressrelease-31.05.2011.doc).
  - 30 [www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/Wal-Mart-order-31.05.2011.pdf](http://www.comptrib.co.za/assets/Uploads/Wal-Mart--Massmart-Transcripts/Wal-Mart-order-31.05.2011.pdf).
  - 31 Competition Tribunal of South Africa, *Metropolitan Holdings Limited and Momentum Group Limited*, 41/LM/Jul10, 9 December 2010. See in particular, paragraph 70.
  - 32 Competition Tribunal of South Africa, *ISCOR Limited and Saldanha Steel (Pty) Ltd*, 67/LM/Dec01, 4 April 2002.
  - 33 Namibian Competition Commission, *DCD-Dorbyl and Elgin Brown & Hamer Group Holdings*, 2012.
  - 34 Namibia Supreme Court, *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated*, SA 41/2011, 4 November 2011.
  - 35 Botswana Competition Authority, *AON Botswana and AON Holdings and CEDA Venture Capital*, 2012.
  - 36 Botswana Competition Authority, *MRI Botswana and BOMAID*, 2012. See also Norton Rose, 'Antitrust, competition and regulatory bulletin', January 2013.
  - 37 Namibian Competition Act, section 16(1)(g)
  - 38 Federal Competition Bill, section 7(1)(a)
  - 39 See Competition Commission Annual Report 2009/2010, pages 2–5, available at [www.compcom.co.za/assets/Publications/Annual-Reports/Annual-Report-2009-10-Final.pdf](http://www.compcom.co.za/assets/Publications/Annual-Reports/Annual-Report-2009-10-Final.pdf); van Wyk M, 2012, 'Recent development in South African competition policy with special emphasis on prioritizing sector for investigation', Paper prepared for Cresse Summer School and Annual Conference in Competition and Regulation, available at [www.cresse.info/uploadfiles/2012\\_PAR2\\_3\\_PAP.pdf](http://www.cresse.info/uploadfiles/2012_PAR2_3_PAP.pdf); Makhaya, G., Mkwanazi, W., and Roberts, S, 2012, 'How should young institutions approach competition enforcement? Reflections on South Africa's experience', *South African Journal of International Affairs*, 19(1)
  - 40 See UNCTAD, 2013, 'Prioritization and resource allocation as a tool for agency effectiveness', Note by the UNCTAD secretariat, available at [www.unctad.org/meetings/en/SessionalDocuments/ciclpd20\\_en.pdf](http://www.unctad.org/meetings/en/SessionalDocuments/ciclpd20_en.pdf).
  - 41 See Lewis, D, 2002, 'Competition Policy in South Africa – Where has it come from and where is it going?', Speech to Investment Analysts' Society of South Africa, 16th May 2002, Johannesburg. See also Lewis, D., 2002, 'The Role of Public Interest in Merger Evaluation', International Competition Network Merger Working Group, Naples, September 2002. Lewis argues that the identity of the decision-maker should be determined by the impact of the alternative models on the credibility of the competition authority in each country.
  - 42 See *Shell South Africa/Tepco Petroleum* (SACT, 2001), paragraph 38, and *Distillers Corporation (SA) and Stellenbosch Farmers Winery Group*

(SACT, 2003), paragraph 240. See also, for example, Gal, 'Size does matter: the effects of market size on optimal competition policy', 2001 citing R. Shyam Khemani, 'Merger Policy and Small Open Economies: The Case of Canada', in *Perspectives in Industrial Organization* 215, 223, Ben Dankbaar, John Groenewegen, & Hans Schenk eds., 1990. 'the importance of economic efficiency as a stand-alone objective is highlighted in small economies where interdependencies in the interests of various stakeholders are likely to be more significantly affected by a particular market transaction. This reality increases the probability of lobbying, rent seeking behavior, and political posturing aimed at the safeguarding or pursuing other objectives promoted by public benefit or public interest criteria. As one analyst notes, "if competition policy is influenced by non-economic considerations, the risks of costly industrial policy in the guise of competition policy becomes high."'

43 See *Wal-Mart/Massmart* (SACT, 2011), paragraph 32 'Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.'

44 See *Shell South Africa/Tepco Petroleum* (SACT, 2001), paragraph 58: 'the role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments in this case the Employment Equity Act, the Skills Development Act.', *Distillers Corporation (SA) and Stellenbosch Farmers Winery Group* (SACT, 2003), paragraph 237: 'where there are other appropriate legislative instruments to redress the public interest, we must be cognisant of them in determining what is left for us to do before we can consider whether the residual public interest, that is that part of the public interest not susceptible to or better able to be dealt with under another law, is substantial.' and *Metropolitan Holdings/Momentum Group* (SACT, 2010), paragraph 110 'Although it is correct to make these arguments, adopting a deferential approach does not mean a hands-off approach. The Act gives us a discretion which we must exercise where appropriate. The approach set out earlier in this decision indicates that we view the public interest through a competition prism.'



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